infancy with a grandmother or an aunt, no one would say that, when the child had arrived at the age of fourteen without perhaps ever having seen either of its parents, by force of mere instinct it would necessarily prefer to be with them rather than with the persons with whom it had always lived."

The appeal was dismissed.

Although the reasons for the child in that case being in the custody of someone other than her mother are different from the reasons for the child in this case not being in the custody of her father, I think it would be difficult to find an authority which was more in point with the case we are considering and which more appropriately indicates what the decision in this case should be, provided that the law as expressed by Lord Esher in *The Queen v. Gyngall* [1] is applicable here.

I do not know of, nor has my attention been drawn to, any written law in force in the Federation making any provision which is applicable in the circumstances of this case. The Court must therefore apply the Common Law of England and the Rules of Equity as administered in England by virtue of the provisions of sub-section (1) of section 3 of the Civil Law Ordinance, 1956, and, by virtue of sub-section (2) of that section, in the event of conflict or variance between the Common Law and the Rules of Equity with reference to the same matter, the Rules of Equity shall prevail. Accordingly I think that the law as stated by Lord Esher in the case of *The Queen v. Gyngall* [1] is the law applicable here.

To summarise I think that the position in this country is:—

(a) at Common Law that the parent has, as against other persons generally, an absolute right to the custody of the child, unless he or she has forfeited it by certain sorts of misconduct or the right of the parent has been otherwise affected by some specific statutory provision;

(b) in equity that the dominant matter for the consideration of the Court is the welfare of the child, although a parent has a right but not an absolute right to the custody of the child and the Court will be very cautious in regard to the circumstances in which they will interfere with the parental right. The Court has to consider the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, the religion of the child, and the happiness of the child.

That being the case it seems to me that by acquiescing in the respondent having the guardianship and the custody of the child for the last 16 years and contributing little or nothing towards her maintenance, the applicant, although he cannot be said to have been guilty of any active misconduct, has placed himself in such a position that it would not only be better for the child but essential for its welfare for the child to remain in the custody of the respondent. I think that all the considerations which weighed with Lord Esher in the case of *The Queen v. Gyngall* are present in this case and should be considered in the same light.

I should add that, quite apart from the above considerations, I am satisfied that the above conclusion is correct because I spoke to Ponnachi in Chambers at the request of Counsel for both parties, but in their absence, and she stated unequivocally that she wished to remain with the respondent and did not wish to have anything whatever to do with the applicant.

The application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Murugason & Co.; Wong, Paramjothy & Goh.*

PENANG MOTORS (1950) LTD. v. SUAH MOTORS

[O.C.J. (Rigby J.) April 8, 1957]

[Penang — Civil Suit No. 105 of 1955]

Landlord and Tenant — Rent — Demand — Arrears of rent — Duty of landlord to make demand for rent on premises — Time from which arrears run.

Where there is an agreement to pay rent monthly, there is a duty upon the tenant to pay the rent when it is lawfully demanded on the premises. But there can be no default in payment unless and until that demand has been made. Therefore a tenant can only be said to be in arrears as from the date the lawful demand for payment is made and the 14 days' period for the purposes of the Control of Rent Ordinance can only be said to run as from that date.

In this case the plaintiffs sought to eject their tenants the defendants, on the ground that the tenancy had been terminated by a Notice to Quit dated August 17, 1954, on September 30, 1954, and that on August 16, 1954, although a demand for rent was made on the premises, the defendants were more than 14 days in arrear with their rent. The defendants admitted that their tenancy had been terminated as at September 30, 1954, but denied that they had been at any time in arrears with their rent; they therefore claimed to be protected by the Control of Rent Ordinance, 1948.

Held: even if in this case the rent was payable in advance and therefore lawfully due on August 1, 1954, having regard to the fact that lawful demand for payment was admittedly only made on the premises on August 16, 1954 (it was in fact paid on August 17), therefore the defendants, for the purposes of the Ordinance, was not 14 days in arrears at the date of the service of the Notice to Quit, i.e. August 17, 1954.

Cases referred to:—

(1) *Chop Lean Yak v. Ng Ah Hee* (1953) M.L.J. 6.

(2) *Corbett v. Taylor* (1864) 23 U.C.R. 454, C.A.

ACTION FOR EJECTMENT.

C. O. Lim for the plaintiffs.

Eusoffe Abdoolcader for the defendants.

Cur. Adv. Vult.

Rigby J.: This is an action for ejectment brought by the plaintiffs, Penang Motors (1950) Ltd., against the defendant, trading under the name of Suah Motors, on the ground that the defendant's tenancy had been terminated by a Notice to Quit dated the 17th August, 1954, with effect from the 30th September, 1954, and that on the 16th August, 1954, although a demand for rent was made on the premises, the defendant was more than 14 days in arrear with his rent.

The defendant admitted that his tenancy had been terminated as at the 30th September, 1954, but denied that he had been at any time in arrears with his rent. He, therefore, claimed to be protected by the Control of Rent Ordinance, 1948.

The substantial question for determination is one of fact as to whether or not the rent lawfully due was in arrear for 14 days or upwards at the date of the service of the Notice to Quit determining the tenancy. This, in turn, depends on whether the rent was payable monthly in advance or in arrear.

Mr. C. O. Lim, in opening the case for the plaintiffs, stated that if upon the facts it was found that the rent was payable in arrear he would be the first to say that he must be out of Court.

Turning now to the facts of the case. The plaintiffs, as their business name denotes, are a firm of motor-car dealers. They are the owners of the premises in question at No. 20, Northam Road, Penang, having purchased them, subject to existing tenancies, from their predecessor in title on the 3rd June, 1952.

The defendant at that time was a tenant in those premises and had, in fact, been a tenant there in continuous occupation since 1934. He was also a dealer in the automobile trade carrying on his business at those premises.

On the 4th June, 1952, the plaintiffs, through their Solicitors, served a Notice of Action on the defendant requesting him to attorn tenant to them and to pay the rent to them as from the 1st June, 1952.

On the 29th June, 1953, the plaintiffs, through their Solicitors, served a Notice of Action in the form of a Notice to Quit on the defendant requiring him to deliver up the premises on the 30th June, 1954. Paragraph 2 of that Notice was in the following terms:—

> "The said premises were purchased by our clients on the 3rd day of June, 1952, and our clients reasonably require the same for the purpose of carrying on their own business and that such business is substantially the same as that being carried on by you on the same premises."

The significance of that paragraph is apparent. However, the defendant failed to comply with that Notice and consequently became a statutory tenant.

On the afternoon of the 16th August, 1954, one of the plaintiffs' employees delivered a bill for rent for the current month of August at the defendant's premises. There has been some conflict of evidence as to which employee in fact it was who delivered that bill. But the identity of the particular employee is, I consider, irrelevant. The defendant did not then pay the bill. Again, there has been some conflict of evidence as to whether the bill was handed to him with an accompanying request to pay it then and there or whether, as the defendant himself alleges, the bill was simply handed to him and he merely acknowledged the receipt for it on the duplicate copy. In this matter I accept the defendant's version that it was simply handed to him and he signed for it. On the following day, the 17th August, 1954, the defendant received a Notice of Action from the plaintiffs' Solicitors, in the form of a Notice to Quit. Paragraph 2 of that Notice states:—

> "The ground of our intended action is that you have been more than 14 days in arrears of rent payable in advance though the same was lawfully demanded from you."

That is the basis of the plaintiffs' action.

The plaintiff alleged that at the time he purchased the premises in June, 1952, the defendant said that he wanted to pay the rent in arrear but the plaintiff did not agree to that. He said that he sent the firm's bill collector to tell the defendant that the rent was payable in advance and the defendant agreed. The bill for the month of June, 1952, was sent on the 17th June, 1952. Thereafter, for the rest of 1952, the bill was sent on the first of each month. In 1953, the bills were submitted within the first

few days of each month. The plaintiff admitted that in 1954 the bills from time to time were both submitted late and paid late. The plaintiff's bill collector gave evidence purporting to confirm the fact that he told the defendant in June, 1952, that the rent must be paid in advance and that the defendant agreed.

The defendant himself gave evidence. He stated that he had always paid the rent in arrear to the plaintiff's predecessor in title and he denied that after the plaintiff had acquired the premises there had been any agreement to alter that procedure and pay the rent in advance. The defendant produced in evidence rent receipts for December, 1945, to May, 1952, issued by his former landlord, which clearly established that the rent throughout that period was, in fact, paid monthly in arrear.

The onus is on the plaintiff to establish that there was, in fact, an agreement with the defendant in June, 1952, that the rent should be paid in advance and not in arrear. On the simple issue of credibility I am in no way satisfied that that onus has been discharged. The testimony of the defendant was, in my view, far more credible and worthy of credit in this matter than that of the plaintiff and his employee. It is true that the defendant admitted in evidence that for the last six months in 1952 all the rent bills were dated the first day of each month and were paid by him, by cheque, not later than the middle of the month. For 1953, the bills were all dated early in the current months and were paid by him, by cheque, before the middle of each current month. In effect, therefore, the rent for 1952 and 1953 was monthly rendered in advance and paid by the defendant in advance. But I am not satisfied that this was the result of any pre-existing agreement between the plaintiff and the defendant. The defendant himself said that he paid the rent as and when the bill collector demanded it. He did it because it was convenient to him to do it. I see no reason to disbelieve that evidence. It is apparent that the rent bills for some of the months in 1954 were very far from being rendered in advance. The bill, for example, for April, 1954, was dated the 15th June, 1954, and that for July, 1954, was dated the 31st July, 1954. The explanation given by the plaintiff for this late renderings was that the clerk in charge may have been away on leave. It was suggested that the defendant was in financial difficulties in 1954 and became more and more irregular in his monthly payments of rent. The simple fact remains, however, that the plaintiffs themselves for part of 1954, were irregular in submitting the monthly rental accounts.

On the evidence I am satisfied that there was an arrangement, whether express or implied, between the plaintiffs and the plaintiffs' predecessor in title that the rental should or could be paid in arrear at the end of the month, and the plaintiffs have failed to discharge the onus that lies upon them to establish that there was any express agreement to alter that arrangement, so that the rent should in future be paid in advance when the plaintiffs acquired the premises in 1952. It follows, therefore, that I am not satisfied that the defendant was in arrears at the date of the service of the Notice to Quit and the plaintiffs' action must accordingly be dismissed.

That really disposes of the action. But Mr. Eusoffe Abdoolcader, for the defendant, contended that even assuming the existence of an agreement to pay the rent in advance it was the duty of the landlord to make a demand for rent on the premises. In this case the demand — if demand it may be called — was made by the presentation of the rent bill at the defendant's premises on the 16th August, 1954, and the Notice to Quit on the ground that the rent was in arrears for 14 days or upwards was served on the 17th August, 1954. Mr. Eusoffe Abdoolcader contended that since it was the duty of the landlord to make a demand for rent on the premises then it could not be said that a tenant was in arrears with his rent until a demand had been made and that the period of arrears could only be said to run as from the time when the demand had been made and there was a failure to comply with it. In support of his argument Mr. Eusoffe Abdoolcader cited the case of *Chop Lean Yak v. Ng Ah Hee*, [1] and a passage from the judgment of Spenser Wilkinson, J. in that case in which, after referring to various authorities establishing the duty of a landlord in particular circumstances to demand payment of rent on the premises, the learned Judge went on to say:—

> "Upon these authorities I felt bound to hold that it is the duty of the landlord to make a demand for rent on the premises and that if he does not do so he cannot rely upon the proposition that rent is in arrears."

Mr. C. O. Lim conceded for the purposes of this case that it was the practice to demand payment of rent on the premises.

Having regard to the view I have taken upon the facts of this case that it has not been established that there was any agreement to pay the rent in advance, it becomes unnecessary for me to decide the legal point raised by Mr. Eusoffe Abdoolcader. But since it is a matter of obvious practical importance I venture to do no more than express my opinion on the point raised. Where there is an agreement to pay rent monthly in advance, coupled with an obligation on the part of the landlord to make a demand for payment of such rent on the premises, then clearly there is a duty upon the tenant to pay the rent when it is so lawfully demanded on the premises. But there can be no default in payment unless and until that demand has been made. In my view, therefore, a tenant can only be said to be in arrears as from the date the lawful demand for payment is made and arrears can only be said to run as from that date. The meaning of the word "arrears" was considered in a Canadian case dealing with a contract requiring payment of monies. In that case the Court said:—

"We take arrears to mean something which is behind in payment or which remains unpaid..... It implies a duty and a default."

(*Corbett v. Taylor*, (1864), 23 U.C.R., 454, C.A., *per curr.* at p. 455).

(See "Words and Phrases Judicially Defined" by Roland Burrows, Vol. 1, page 231).

Applying those words, where rent is payable in advance on demand on the premises by the landlord clearly there is a duty to pay it on such demand. But there can be no default in paying it until it has been so demanded. In my view, therefore, even if I had come to the conclusion on the evidence in this case that the rent was payable in advance and therefore lawfully due on the 1st August, 1954, having regard to the fact that the lawful demand for payment was admittedly only made on the premises on the 16th August, 1954, it was in fact paid on the 17th August, 1954, and therefore the defendant, for the purposes of the Ordinance, was not 14 days in arrears at the date of the service of the Notice to Quit, i.e. 17th August, 1954.

I have decided this case wholly on the simple issues of fact before me and on my view of the credibility of the witnesses. I may say, however, that I entertain no regret at the conclusion to which I have come in this case, since the conduct and good faith of the plaintiff, in my view, hardly redounds to his credit. The defendant has been the tenant of these premises for a considerable number of years. Assuming the case for the plaintiff to have been established that the rent was payable in advance it is apparent on the facts that during the months of 1954 he not only acquiesced in the rent being paid considerably in arrears, but at least on two occasions, April and July, actually caused such arrears by his tardy presentation of the accounts for those months. There is no suggestion whatsoever that the plaintiff ever objected to the rent being paid late or that he warned the defendant that he must be more punctual in his payments when demanded. Yet the plaintiff's whole case is based on the fact that on the 16th August, 1954, his employee presented a bill to the defendant on the premises for payment of rent which was not at once paid then and there, and that on the next day, the 17th August, 1954, the Notice to Quit was served on the ground that the rent was more than 14 days in arrears.

I am, of course, aware of the proposition that it would be most unfortunate if mere forbearance on the part of a landlord on one or more occasions to exercise his legal rights of distress or re-entry where there has been a breach or breaches of a condition of the tenancy — as by failure to pay rent when due — were to be held to bind him for the future, since landlords would then tend to be more harsh in the enforcement of their legal rights. But in this case, even if I had believed the plaintiff's case — which I do not — that the rent was payable in advance, the facts, to my mind, indicate that the plaintiff deliberately seized upon what he considered to be a splendid opportunity to get rid of a statutory tenant by serving a Notice to Quit based on non-payment of rent for 14 days or upwards — a state of affairs in which he had in past months not only impliedly acquiesced but, indeed, to which he had actually contributed.

For the above reasons the action must be dismissed with costs.

Action dismissed.

Solicitors: *Lim, Lim & Oon; Ong Huck Lim & Co.*